Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-536

CHRIST T. SERAPHIM,

Petitioner,

v.

THE STATE OF WISCONSIN; THE SUPREME COURT OF THE STATE OF WISCONSIN; THE HONORABLE BRUCE F. BEILFUSS, CHIEF JUSTICE OF THE SUPREME COURT; THE STATE OF WISCONSIN JUDICIAL COMMISSION, KAY LEVIN, CHAIRPERSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

RESPONDENTS' BRIEF IN OPPOSITION

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October 22, 1980

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, the State of Wisconsin Judicial Commission and Kay Levin, Chairperson, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Wisconsin Supreme Court's July 7, 1980

judgment and opinion in In the Matter of the Complaint Against the Honorable Christ T. Seraphim, 97 Wis.2d 485, 294 N.W.2d 485 (1980). The case was prosecuted below by the State of Wisconsin Judicial Commission.

STATEMENT OF THE CASE

The procedures under which the petitioner was disciplined have their roots in Wisconsin's Code of Judicial Ethics, promulgated by the Wisconsin Supreme Court on November 14, 1967. The Code has governed the conduct of Wisconsin's judges since January 1, 1968. In re Promulgation of a Code of Judicial Ethics, 36 Wis.2d 252, 255, 262a, 153 N.W.2d 873, 874, 878, 155 N.W.2d 565 (1967).[1]

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[1] The stated effective date does not apply to Rules 7, 14 (as amended), and 17. Rules 7 and 14 were not at issue in the proceeding below. Rule 17 has been effective since December 31, 1974. In the Matter of the Amendment of Code of Judicial Ethics, 63 Wis.2d vii (1974).

In 1971, the Wisconsin Supreme Court promulgated rules for the implementation of the Code, effective January 1, 1972. In the Matter of the Promulgation of the Code of Judicial Ethics, 52 Wis.2d vii (1971). One of the implementing rules provided:

> "9. A judge may be removed or suspended from office for:
>
> (a) Willful violation of a rule of the Code of Judicial Ethics; . . ."

By footnote to this rule, the court pointed out that an amendment to the state constitution was required for the sanctions of removal and suspension. Id., at ix.

On April 5, 1977, the Wisconsin Constitution was amended to authorize removal and suspension. Article 7, Section 11 provides:

> "Each justice or judge shall be subject to reprimand, censure, suspension, removal for cause or for disability, by the supreme court pursuant to procedures established by the legislature by law . . . ."

The implementing legislation, sections 757.81 to 757.99, Wis. Stats., became effective August 1, 1978. Pursuant to sections 757.85(1) and 757.81(4)(a), Wis. Stats., "misconduct" constitutes "cause" under Article 7, Section 11 of the Wisconsin Constitution and includes, inter alia, "[w]ilful violation of a rule of the code of judicial ethics."

REASONS FOR DENYING THE WRIT

1. The decision below applies a principle of fair warning fully consistent with that applied by the Supreme Court in Dobbert v. Florida, 432 U.S. 282, 297-98 (1977).

Petitioner contends that the Fourteenth Amendment forbids inquiry into those instances of his misconduct which occurred before August 1, 1978, the effective date of the statute which implements the Wisconsin Supreme Court's constitutional authority to suspend or remove judges for misconduct. Citing In

re Inquiry Concerning a Judge, 357 So.2d 172, 181 (Fla. 1978) for the proposition that "due process . . . contemplates notice that an act is a removable offense at the time it is committed," petitioner argues, in essence, that he was not put on notice that he could be removed or suspended from office for misconduct until August 1, 1978.

The state supreme court properly rejected this claim. Noting that it had adopted a rule in 1971 which provided that a judge may be removed or suspended from office for wilful violation of the Code of Judicial Ethics, the court stated:

> "Although a note to this rule indicated that these sanctions required constitutional authorization, the rule was nevertheless sufficient to inform [petitioner] of the severity with which violations of the Code of Ethics were viewed and of the possible sanction that was felt to be appropriate." 97 Wis.2d 485, at 494.

This ruling applies a principle of fair warning fully consistent with that applied by the Supreme Court in the

context of an ex post facto claim raised by the petitioner in Dobbert v. Florida, 432 U.S. 282 (1977). Dobbert affirmed the imposition of a valid state death penalty provision in effect at the time the petitioner was tried, but not at the time he committed his offense. The petitioner's constitutional challenge was rejected because an invalid death penalty statute in effect at the time of the offense "served as an 'operative fact' to warn the petitioner of the penalty which Florida would seek to impose . . . if he were convicted of first-degree murder." 432 U.S. 282, 297-98 (1977).

The opinion below does not decide "important questions of due process" which "should be" settled by this Court. [Petition, p. 9]. It decides a question of notice applicable solely within the context of Wisconsin's history of judicial discipline, and it does so by applying a principle of notice established by the Supreme Court in 1977. Indeed, since judicial disciplinary proceedings do not give rise to criminal sanctions, the instant case presents

more compelling reason for application of Dobbert's fair warning principle than did Dobbert itself.

2. The decision below does not conflict with Supreme Court and Seventh Circuit decisions regarding impermissible statutory vagueness.

Petitioner claims that Rules 8, 11, 15, 16 and 17(e)[2] of the Code of Judicial Ethics and sec. 757.81(4)(a), Wis. Stats. are unconstitutionally vague because they "contain no objective standard . . . and offer no guidance to those who seek to avoid violation." [Petition, p. 15]. Employing principles set forth in the allegedly "conflicting" decisions cited by petitioner, the state supreme court properly rejected this claim.

The pertinent principles of statutory construction are stated in

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[2]Rule 17(e) cannot be at issue here, since its constitutionality was not challenged in the proceeding below.

Conally v. General Construction Co., 269 U.S. 385 (1926), in a passage not quoted by petitioner:

> ". . . [T]he decisions of the [Supreme Court] upholding statutes as sufficiently certain rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, . . or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, . . or, . . 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.'" 269 U.S. 385, at 391-92.

These principles are echoed in the Seventh Circuit decisions cited by petitioner and, as well, in the decision below.

A disciplinary rule need not "satisfy the same rigorous standards as criminal statutes." Soglin v. Kaufman, 418 F.2d 163, 168 (7th Cir. 1969). It is only necessary that disciplinary

sanctions not be imposed "simply on the basis of allegations of 'misconduct' without reference to any pre-existing rule which supplies an adequate guide." Id.

Nor is a disciplinary rule constitutionally infirm if it does not itself set forth specific guidelines for conduct. It is sufficient, if the words of the rule do not themselves have "inherent, objective content," that there exist customs and usages or authoritative constructions to lend the rule accepted meaning. Bence v. Breier, 501 F.2d 1185, 1190 (7th Cir. 1974).

The rules which govern judicial conduct have accepted meaning. As the state court noted, petitioner's "reading of the Code of Judicial Ethics [was] not as a layman, unfamiliar with the law, but as a judge of twenty years' experience and an attorney of almost twenty more." 97 Wis.2d 485, at 499. There were guidelines for his conduct "in the Canons of Ethics, applicable to both attorneys and judges, adopted by the American Bar Association and other bar associations, and also in the general moral and ethical

standards expected of judicial officers by the community." 97 Wis.2d, 485, at 498, quoting Sarisohn v. Appellate Division, Second Dep't., Supreme Ct. of N.Y., 265 F. Supp. 454, 458 (E.D.N.Y. 1967). Accord: In re Gillard, 271 N.W.2d 785, 809, n. 7 (Minn. 1978); Keiser v. Bell, 332 F. Supp. 608, 614-15 (E.D. Pa. 1971); Bartlett v. Flynn, 50 A.D.2d 401, 378 N.Y.S.2d 145 (1976); In re Nowell, 293 N.C. 235, 237 S.E.2d 246, 251-52 (1977).

The opinion below does not decide a "[c]onstitutional question of impermissible vagueness . . . which is in conflict with applicable decisions of this Court." [Petition, p. 12]. To the contrary, it applies the principles set forth in the allegedly "conflicting" Supreme Court and Seventh Circuit decisions cited by petitioner. In so doing, it reaches a decision fully consonant with the many state and federal court decisions which have upheld statutes and constitutional provisions which define in such terms as "for cause" and "conduct prejudicial to the administration of justice" the grounds

for removing judges from office. 97 Wis.2d 485, at 498-99, and cases cited therein.

3. The issue raised by petitioner's equal protection claim is too narrow to warrant Supreme Court review.

Petitioner claims that sec. 757.87, Wis. Stats. violates the equal protection guarantee of the Fourteenth Amendment because it grants the Commission, but not the judge, the right to request a jury hearing. The state supreme court properly rejected petitioner's equal protection claim:

> "Under the . . . procedure established by the legisature, [petitioner] is afforded no less protection than any other judicial officer of this state who is alleged to have engaged in judicial misconduct. No judge . . . is entitled to a hearing before a lay jury . . . . [T]he choice between a judicial panel and lay jury lies entirely with the commission.

> In this respect judicial disciplinary proceedings are no different than any number of other proceedings in which the initiating party is allowed to make important procedural decisions as to where and how the action will be tried." 97 Wis.2d 485, at 496.

The issue raised by the state court's ruling is too narrow to warrant review by this Court on certiorari. Since no other state permits a lay jury to hear charges of judicial misconduct, 1 Judicial Conduct Reporter (Spring 1979), at 7, the issue can arise only in those few cases in which a Wisconsin judge seeks a jury hearing in a judicial disciplinary proceeding.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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